

ATTACHMENT D



To: Board of Prison Commissioners
From: ACLU of Nevada
Date: July 8, 2008
Re: AR 610, AR 810, MJ49

Dear Governor Gibbons, Attorney General Masto, and Secretary Miller,

Below please find the ACLU of Nevada's comments on AR 810 (agendized for today's meeting), AR 610 (which Deputy Attorney General Traut informed the ACLU would soon be revamped), and our ongoing concerns about inmate disciplinary regulation MJ49, which restricts access to Administrative Regulations. We continue to advocate for more transparency in the AR process, which we believe prevents meritless lawsuits and increases inmate confidence and discipline within NDOC. Designating all inmate-related ARs as non-confidential ARs would also permit our office to widely distribute new ARs in a manner that we believe reduces grievances and kites in the NDOC system, as more inmates would understand their rights. If you should have any concerns or questions about this testimony, please do not hesitate to contact me. Thank you very much for your time and attention to these important matters of constitutional import.

Sincerely,

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AR 810

The ACLU of Nevada writes to commend this Board for changing the terms of AR 810, relating to religious expression by NDOC inmates. We believe that the change from a delineated list of "allowed" items to a more open-ended AR that protects Constitutional rights as a default is proper and should be applauded. The AR now appropriately incorporates legal language that the courts have used to determine First Amendment violations. Of course, with the new AR 810, the devil will be in the details of its application, and in determining what constitutes a security threat for any NDOC institution.

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We urge NDOC to properly train all staff who will be making individual determinations on AR 810 grievances to ensure that security risks will be determined in a consistent manner across faith groups, and that security risks are not exaggerated to restrict lawful exercise of religion. The proposed AR now permits individual institutions to develop Operational Procedures (810.02.3) scheduling religious worship and space. We are concerned that this could lead to inconsistency in the treatment of faith groups, and we are heartened by the Director's Religious Review Team, which has been designated to ensure uniformity. Uniformity and consistency are of course the key to ensuring fair treatment and avoiding lawsuits based on religious discrimination.

The ACLU of Nevada has received dozens of complaints about the application of AR 810, and we are hopeful that we can distribute the new AR and encourage inmates to re-grieve under the revised procedures. Of course, this would require a statement by NDOC staff that AR 810 is non-confidential, or else our distribution of this regulation might cause inmates to violate MJ49, which we believe is an excessively punitive discipline for possession of confidential ARs. Please see below section on MJ49.

AR 610

We have also received numerous complaints about AR 610, restricting the availability of house arrest and other programs based on HIV status. We have contacted Deputy Attorney General Traut, who has cordially informed our office that the regulation is being revised and presented to the Director for approval. It is unclear whether AR 610 is on today's agenda, as the Attachment notes that four ARs are under discussion, but only three ARs are provided as back-up material. We are therefore commenting on AR 610 without knowing if such changes have been formally suggested by NDOC or the Attorney General's office.

AR 610, and specifically 610.03.1 places limits on certain HIV+ individuals' rights to access alternative programs, house arrest, and work release. We believe that these irrational restrictions violate the Equal Protection Clause of the U.S. Constitution. While courts have allowed some leeway to institutions to restrict HIV+ access in certain specific high-risk situations, we firmly believe that a blanket ban on all HIV+ individuals' access to programs outside the main security area is discriminatory and unconstitutional. We urge NDOC to revise this regulation, and restrict HIV+ individuals' access to alternative programs only where there is a compelling, factual, and specific reason to do so. This would move NDOC into line with national community standards, as state departments of correction across the country are revisiting their treatment of HIV+ individuals to ensure that old biases and prejudices are not unlawfully written into prison regulations.

It is worth noting that restrictions on access to work release programs are particularly illogical and discriminatory for prisoners want to be productive members of the community. The possibility of work release gives prisoners hope, and the opportunity to become contributing members of society. Not only does increasing access to work release increase the possibility for successful reentry and rehabilitation, it is also generally less costly than incarceration.

We have again been informed by DAG Traut that AR 610 is being revised, and that inmates may re-grieve their complaints about treatment based on their HIV+ status.

While we appreciate her gracious offer to personally oversee any such re-grievances, it is somewhat counter-productive to do so without being able to inform inmates of the changes relevant to their lives and rights. Otherwise, they have no sense of hope or reason to believe a subsequent grievance will be treated differently. Of course, this would require a statement by NDOC staff that AR 610 is non-confidential, or else our distribution of this regulation might cause inmates to violate MJ49, which we believe is an excessively punitive discipline for possession of confidential ARs. Please see below section on MJ49.

MJ49

Under NDOC's list of "Major" inmate disciplinary violations is MJ49 – "Possession of any confidential prison regulation." It reads: "Any prison regulation, which is not specifically delineated as accessible to inmates, is considered confidential. A prison regulation includes, but not limited to, Administrative Regulations, Institutional Procedures, Emergency Response Regulations, and Post Orders. (Class A)." This crime is extremely severe – indeed, it is the same class of penalty as for an escape involving weapons or hostages. *See, i.e.,* MJ47. In the past, I have spoken out against this regulation before this Board, because in reality the default seems to swing the other way – NDOC instead chooses to stamp "Confidential" on confidential regulations, leaving non-confidential regulations blank. This creates a bizarre void where inmates may be penalized for having such an AR under MJ49, but clearly not all ARs are confidential simply because they remain unmarked. I repeat my suggestion, made at the last meeting, that MJ49 should be changed to comply with actual practice, and penalize only possession of any AR actually marked "Confidential."

The inability to share basic ARs that set the terms of Nevada inmates' incarceration prevents this office from assisting inmates with their constitutional rights. Perhaps more importantly to this Board, it increases the level of ignorance, doubt, worry, and fear – all of which naturally increase kites, grievances, and lawsuits against NDOC. It is clearly morally and even fiscally sound to permit inmates access to ARs that regulate their behavior, and which pose no security threat to NDOC. Both AR 610 and 810 fit into this category, yet our office is unable to share this basic info and perhaps prevent unnecessary and wasteful litigation of rights that may already exist under the proposed ARs.